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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

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OPINION AND JUDGMENTS BELOW

Defendant agrees with the petitioner's summary of the opinion and judgments below.

JURISDICTION

Defendant agrees with the petitioner's assertion of jurisdiction in this court.

QUESTIONS PRESENTED

1. Does the mere allegation of a violation of the Civil Rights Act afford a federal court review of state court judgments rendered with jurisdiction over the parties, property and subject matter?

2. Does res judicata preclude the parties from relitigating in federal court issues that already have been litigated between the same parties in state court?

3. Do unsupported conclusionary allegations of conspiracy state a claim under the Civil Rights Act?

ARGUMENT NO. 1

The mere conclusionary allegation of a violation of the Civil Rights Act does not afford federal review of state court judgments rendered with valid jurisdiction. It is at once apparent from reading the Complaint that the gravamen of plaintiff's Complaint is simply that three state court judgments entered against him denied him his civil rights for the reason that the respective courts did not have jurisdiction to

enter the judgments. The Answer and Counterclaim clearly shows that Francis M. Cocke himself invoked the jurisdiction of the Superior Court of Arizona in June of 1969. No citations are needed to advise this Court that the filing of a general Answer and Counterclaim by Francis M. Cocke clearly gave the Superior Court of Arizona jurisdiction of the person of Francis M. Cocke. Likewise, the legal description of the real property attached to the Complaint shows that the property involved in the state court litigation is located in Maricopa County, Arizona. The Superior Court of the State of Arizona clearly had jurisdiction over the real property located in Maricopa County. Jurisdiction over the subject matter, to-wit: the real estate escrow, is likewise apparent.

It is respectfully submitted that the state court, having jurisdiction over the person, property and subject matter of the action, had jurisdiction to enter the three judgments which plaintiff now seeks to relitigate under the Civil Rights Act. Plaintiff has been given numerous opportunities to question the jurisdiction of the trial court and the other Arizona courts through which he has processed his litigation. Notably, in the case of Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756, the court dealt at length with each of the jurisdictional arguments of plaintiff, which are sought to be relitigated in the Federal District Court. In that case, the Court stated:

> "This Court is initially faced with a 'jurisdictional' attack raised by appellant. At the time of oral argument, appellant

contended that this appeal should be dismissed because the trial court lacked jurisdiction to enter the judgment appealed from. Because this issue had not previously been raised in this case before this Court, appellant was granted leave to file a supplemental memorandum on this issue and appellee was granted time to file a response thereto.

2. James Stewart Company is not a party to or involved in this appeal.

3. This Court has previously, in Cocke v. Cocke, 13 Ariz. App. 57, 474 P.2d 64 (1970), determined that Mrs. Cocke's interest in this real property was not sub-

Appellant has filed a twenty-three, legal-size page, memorandum in this Court which, distilled to its bare bones, contends the trial court lacked jurisdiction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions - granting the escrow agent attorney's fees - "it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations under the other provi-

sions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant."

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispensable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court was without jurisdiction to proceed.

"Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, supra, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel.

"The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is likewise no contention that the trial court

lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct concepts, and jurisdiction is not involved in the foregoing situation.

"Appellant's next argument that the buyers under the escrow instructions were 'indispensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the

attorney's fees claimed. In such circumstances neither the buyers nor any other party to the escrow agreement would even be proper parties to Transamerica's claim for attorney's fees, let alone indispensable parties.

"For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it."

In the case of Sexton v. Berry (5th Cir., 1956), 233 F.2d 220, a very analogous case, the court held:

"It is shown upon the fact of this complaint that appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act, 42 U.S.C.A. §1981 et seq. This Act does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court. Davega-City Radio, Inc., v. Boland, Supra; Bottone v. Lindsley, 10 Cir., 170 F.2d 705." (At page 226)

In the case of Scott v. California Supreme Court, 426 F.2d 300 (9th Cir., 1970), the court unequivocally held that where the plaintiff had simply lost his case in the state courts and since the state courts

had valid jurisdiction, plaintiff was absolutely precluded from collaterally attacking the judgments of the state courts under the guise of the Civil Rights Act. Other cases holding that a party is collaterally estopped from attacking valid state court judgments are: Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir., 1973); Bricker v. Crane, 468 F.2d 1228 (1st Cir., 1972); P. I. Enterprises, Inc., v. Cataldo, 457 F.2d 1012 (1st Cir., 1972); Lynch v. International Banking Corp., 31 F.2d 942 (9th Cir.), certiorari denied, 280 U.S. 571.

ARGUMENT NO. 2

The principles of res judicata preclude the same parties from relitigating in federal court the same issues that have been litigated in state court.

It is a well established principle of United States District Court jurisdiction that the Federal court is without power to compel relitigation of a case already adjudicated in a state court of competent jurisdiction. In the case of Sexton v. Berry (5th Cir., 1956), 233 F.2d 220, the Court held:

> "What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this court. As held by this court in General Exporting Co. v. Star Transfer Line, 6 Cir., 136 F.2d 329, 335, a federal District court will not function

as a court of review for the state court. The District Court there dismissed an action praying that proceedings in the state court be declared null, void and of no effect and this court affirmed the decision of the District Court, stating:

> "'The attempt to relitigate in federal courts issues already determined in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D.C.N.C., 18 F. Supp. 409, 413 (three-judge court); Davega-City Radio v. Boland, D.C.N.Y., 23 F.Supp. 969, 970 (three-judge court); Hall v. Ames, 1 Cir., 190 F. 138, 140, 141; Furnald v. Glenn, 2 Cir., 64 F. 49, 54.'

"Cf. Davega-City Radio, Inc., v. Boland, D.C.S.D.N.Y., 23 F. Supp. 969, 970, in which the court declared:

> "'There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U.S. 156, 164, 53 S.Ct. 98, 100, 77 L.Ed. 231, 86 A.L.R.

298; Lynch v. International Banking Corp., 9 Cir., 31 F. 2d 942, certiorari denied, 280 U.S. 571, 50 S.Ct. 28, 74 L.Ed. 624; Furnald v. Glenn, 2 Cir., 64 F. 49, 54; Ritholz v. North Carolina State Board, D.C.M.D.N.C., 18 F.Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court.'

"See also H.J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505, 509." (At pages 225-226)

In the recent case of Francisco Enterprises, Inc., v. Kirby, 482 F.2d 481 (9th Cir., 1973), wherein plaintiff filed a complaint in the United States District Court seeking injunctive relief on the basis of violations of the First, Fourth, Fifth and Fourteenth Amendments and for violations of the Civil Rights Act by reason of an adverse determination of the California Department of Alcoholic Beverage Control, the court held:

"Res judicata principles have been consistently applied to

> preclude parties from relitigation of federal constitutional claims in a federal district court subsequent to an adverse determination on the merits of such claims by a state court of competent jurisdiction. The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court."

ARGUMENT NO. 3

Conclusionary allegations of conspiracy unsupported by any factual allegations, do not state a claim under the Civil Rights Act.

A thorough reading of the plaintiff's Complaint with reference to Transamerica will reveal that the plaintiff has merely set forth in a shotgun approach a barrage of unrelated statements accompanied by his subjective conclusion that the defendant Transamerica was in a conspiracy with the other defendants to deny the plaintiff one or more of his alleged civil rights. It is fundamental that upon a Motion to Dismiss only the material facts and not the unsupported conclusions of the pleader are considered in determining whether the Complaint states a claim under the Civil Rights Act. Chessman v. Teets, 350 U.S. 3; Lewis v. Brautigan (Civ. 5, Fla.), 227 F.2d 124, 55 A.L.R.2d 505; Dunn v. Gazzola (CA 1, Mass.), 216 F.2d 709; Scott v. Empire Land Co. (5th Cir.), 24 F.2d 417; Sexton v. Berry (6th Cir.), 233 F.2d 220.

In Oppenheimer v. Roth, 468 F.2d 901 (9th Cir., 1972), the court held that the

district court was without subject matter jurisdiction under the Civil Rights Act in a pro per complaint that merely alleged the legal conclusion of a violation of civil rights.

In the case of Reese v. Nixon, 347 Fed.Supp. 314 (C.D.Ca., 1972), the court found that a civil rights complaint against various federal, state, county and city officers, including the President of the United States, contained merely bald conclusions and assertions that the defendants had conspired to deprive plaintiffs of their civil rights, and that these conclusionary allegations, unsupported by any factual data, were insufficient to state a claim under the Civil Rights Act. The court, in dismissing the complaint, further stated:

> "In addition, merely characterising the defendants' conduct as conspiratorial does not constitute allegations upon which relief in a civil rights action can be granted."

CONCLUSION

Plaintiff's complaint was founded solely upon the unwarranted assumption that the state court was without jurisdiction, when the irrefutable facts are that the state courts not only had jurisdiction over the real property, the subject matter, but also over the person of plaintiff Francis M. Cocke who himself invoked that personal jurisdiction. Since the state courts clearly had jurisdiction and so ruled, plaintiff cannot relitigate that question under the guise of the Civil Rights Act.

Finally, the mere conclusionary allegation of a violation of the Civil Rights Act does not afford federal court review of lawful state court proceedings. In addition, plaintiff's complaint was a sham of subjective conclusions, was violative of Rule 8(a) of the Federal Rules of Civil Procedure, and was subject to dismissal by reason of its redundant and prolix nature. Agnew v. Moody, (9th Cir.1964), 330 F.2d 868. The application for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of July, 1975, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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